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Preparatory Commission for the International Criminal Court
Working Group on Elements of Crimes
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Proposals in relation to elements of article 8 (2) (b) (viii) of the Rome Statute of the International Criminal Court

I. Proposal by the United States of America (PCNICC/1999/DP.4/Add.2)

Article 8.2 (b) (viii)–1: War crime of transferring Occupying Power citizens

Elements

1. That the act took place in the course of a military occupation with respect to territory where authority of a hostile army was actually established and exercised.

2. That the accused intended to effect the compulsory transfer, on a large scale, of parts of the population of the Occupying Power into such occupied territory.

3. That the accused effected such transfer of nationals of the Occupying Power into such occupied territory.

4. That the accused intended that such transfer would endanger the separate identity of the local population in such occupied territory.

5. That the transfer worsened the economic situation of the local population and endangered their separate identity.

6. That the transfer was without, and the accused knew it was without, lawful justification or excuse.

Comments

The "without lawful justification or excuse" element of this offence would mean, for example, that the compulsory movement of civilians for the purpose of the fulfilment of the

obligations of the Occupying Power under international law with respect to territory it occupies (e.g., article 43 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land) would not result in culpability with respect to this offence.

Article 8.2 (b) (viii)–2: War crime of deportation

(See also art. 8.2 (a) (vii), art. 8.2 (e) (viii))

Elements/Comments

Use elements for article 8.2 (a) (vii)–1, but delete element 5 regarding the protected status of the transferees.

Article 8.2 (a) (vii)–1: War crime of deportation

(See also art. 8.2 (b) (viii), art. 8.2 (e) (viii))

Elements

1. That the act took place in the course of an international armed conflict.

2. That the accused intended to transfer one or more persons from their lawful place of residence.

3. That the accused caused one or more persons to be forcibly transferred from their lawful place of residence through expulsion or other coercive acts.

4. That the forcible transfer was without, and the accused knew it was without, lawful justification or excuse.

5. That the person or persons transferred were persons protected by Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949.

Comments

States are authorized, for reasons of security and military necessity, to intern civilians in some situations in accordance with articles 41 to 43, 68 and 79 to 104 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949. It is the Prosecutor's burden to prove that internment of civilians was not undertaken for security or other lawful purposes once a prima facie case is made for that defence.

II. Proposal by Costa Rica, Hungary and Switzerland (PCNICC/1999/WGEC/DP.8)

Article 8 (2) (b) (viii): The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

1. The conduct took place in the context of and was associated with an international armed conflict.

2. The perpetrator:

(a) Transferred, directly or indirectly, parts of its own population into the territory it occupies;[1] or

(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

III. Proposal by Japan (PCNICC/1999/WGEC/DP.12)

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

1. The act took place in the context of military occupation with respect to territory where authority of a hostile army was established and exercised.

2. The Occupying Power caused the transfer, directly or indirectly, of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

3. The accused was responsible for such transfer or deportation.

4. Such transfer or deportation was conducted in violation of article 49 of the Fourth Geneva Convention.

IV. Proposal by Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, the United Arab Emirates and Yemen (PCNICC/1999/WGEC/DP.25)

1. The conduct took place in the context of and was associated with an international armed conflict.

2. The perpetrator, directly or indirectly:

(a) Induced, facilitated, participated or helped in any manner in the transfer of civilian population of the Occupying Power into the territory it occupies; or

(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

3. The perpetrator acted wilfully and knowingly.

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[1] Paragraph 2 (a) was subsequently amended orally by the delegation of Switzerland so as to read:
"Transferred, directly or indirectly, parts of the population of the occupying power into the occupied territory it occupies;"